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No. _____

In The
Supreme Court of the United States

STEVE SIMON, ALAN J. SPITZ,
and DANIEL J. KELLEY,

Petitioners,

vs.

ELLIOT SCHWARTZ, NICOLE C. GIAMPAULO, WILLIE JO JIMMERSON, DANIEL RYAN, and MARY ANN WILLIAMS, individually and on behalf of all others similarly situated,

Respondents,

vs.

STRANGE & CARPENTER; MONTS & WARE, L.L.P.; NIX, PATTERSON & ROACH, L.L.P.; CROWLEY, DOUGLAS & NORMAN, L.L.P.; LAW OFFICES OF BARRY L. KRAMER, Plaintiffs' Class Counsel,

Real Parties-in-Interest.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court, in awarding reasonable attorneys' fees in a statutory fee-shifting case, can circumvent this Court's prohibition against contingent risk enhancement (*see City of Burlington v. Dague*, 505 U.S. 557 (1992)) by awarding fees under common fund principles when the fee is paid by the defendant separately, not from the class's recovery.

2. If the answer to the above question is yes, Petitioners ask this Court to resolve the disagreement among the circuits as to whether this Court's decision in *Dague* prohibiting contingent risk enhancement in statutory fee-shifting cases applies when a court awards reasonable attorneys' fees under common fund principles. The Ninth Circuit, in *In re Washington Public Power Supply Sys. Sec. Litig. (WPPSS)*, 19 F.3d 1291 (9th Cir. 1994), has ruled that *Dague* does *not* apply in such circumstances.

PARTIES TO THE PROCEEDING

Petitioners: Steven C. Simon, Alan J. Spitz and Daniel J. Kelley, individual plaintiff class members/objectors.

Respondents: Elliot Schwartz, Nicole Giampaulo, Willie Jo Jimmerson, Daniel Ryan, and Mary Ann Williams, individually and on behalf of all other similarly situated class members.

Real Parties-in-Interest: Plaintiffs' Class Counsel Strange & Carpenter, Monts & Ware, L.L.P., Nix, Patterson & Roach, L.L.P., Crowley, Douglas & Norman, L.L.P., and Law Offices of Barry L. Kramer.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Steven C. Simon, Alan J. Spitz and Daniel J. Kelley respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's opinion (per Thompson and Rawlinson, C.J.J.; Schwarzer (N.Cal.), D.J.), affirming the decision of the District Court for the Central District of California, in an unpublished Memorandum entered October 10, 2002, is reproduced at App. 1.

The United States District Court for the Central District of California, Order Granting Class Counsel's Motion for Attorneys' Fees and Costs (Lourdes G. Baird, J.), entered December 14, 2002, is reproduced at App. 10.

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction to review this case on petition for writ of certiorari pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Ninth Circuit entered its opinion on October 10, 2003 (App. 1), approving the decision of the United States District Court for the Central District of California (App. 10). That decision was the subject of a petition for panel rehearing with a petition for rehearing by the court en banc. Said petition for rehearing and petition for rehearing en banc was denied by the Ninth Circuit on November 18, 2002 (App. 34). This Petition for Writ of Certiorari is filed within 90 days of the decision of the United States Court of Appeals for the Ninth Circuit, and is therefore timely under Rule 13.3 of this Court.

STATUTES AND RULES INVOLVED

15 U.S.C. § 1640(a)(3), provides:

> [A] creditor who fails to comply with the Truth-in-Lending Act is liable "in the case of any successful action" for "the costs of the action *together with a reasonable attorneys' fee* as determined by the court." (Emphasis added).

Rule 23, Federal Rules of Civil Procedure.

INTRODUCTION

> It is in the interest of all the participants in the class action – save the absent members of the class – to settle class actions by collusively transferring money from the class to class counsel. As long as plaintiffs' lawyers are willing to act in a self-interested way, they will be rewarded by defendants with extraordinary fees funded at the expense of the class. Courts will not effectively monitor the abuse because of their interest in seeing cases settled. . . .
>
> . . . .
>
> Our experience and the available evidence of class action practice [combined with] our understanding of the incentives built into the present system sustains our conviction that collusion and inadequate representation are everyday features of the class action world – *a scandalous state of affairs.*

Susan P. Koniak and George M. Cohen, *In Hell There Will Be Lawyers without Clients or Law*, 30 HOFSTRA L. REV. 120, 155 (2001). (Emphasis added).

This appeal seeks to correct an abuse of Rule 23 wherein class action plaintiffs' attorneys, in consort with the defendants, evade this Court's decision in *City of Burlington v. Dague,* 505 U.S. 557 (1992) (hereinafter

Dague), in order to obtain excessive attorneys' fees at the expense of class members' recovery.

The subterfuge here in question was approved by the district court and condoned by the Ninth Circuit Court of Appeals because the district court held that the distinction between reasonable attorneys' fees awarded under common fund principles and reasonable attorneys' fees awarded under statutory fee-shifting principles was not relevant to the court's fee adjudicating process, and that "it exalts form over substance [to argue] that [this settlement] is not a true common fund case." (App. 16).

The district court proceeded to calculate reasonable attorneys' fees paid *separately by the defendant under a fee-shifting statute*, using common fund principles. This had the effect of awarding class counsel a fee which included a contingent risk multiplier because, as a result of the Ninth Circuit decision in *In re Washington Public Power Supply Sys. Sec. Litig.* (*WPPSS*), 19 F.3d 1291 (9th Cir. 1994), risk multipliers are permissible when common fund rather than fee-shifting principles guide the court's fee award analysis.

> The bar against risk multipliers in statutory fee cases does *not* apply to common fund cases.

WPPSS, 19 F.3d at 1299-1300. (Emphasis added).

In permitting class counsel to engage in the *separate attorneys' fee payment/common fund* ruse, the Ninth Circuit Court of Appeals disregarded this Court's decisions in *Gisbrecht v. Barnhart*:

> [W]e again emphasize [that] the lodestar method was designed to govern *imposition of fees on the losing party*,

535 U.S. 789 (2002), 122 S.Ct. 1817, 1827, 152 L.Ed.2d 996 (2002) (emphasis added), and

Dague:

> Enhancement for contingency is *not* permitted under . . . fee shifting statutes. . . .

Dague, 505 U.S. at 567. (Emphasis added).

The Ninth Circuit held that a reasonable attorneys' fee paid separately by the defendant under a fee-shifting statute can be calculated using either common fund or fee-shifting[1] methodologies.

> We reject the arguments of the appellants . . . Simon et al. challenging the method used by the district to calculate class counsel's fees. . . . Even assuming that the settlement did not create a "common fund" as a result of the agreement that class counsel's fees would be paid independently by Citibank and Universal, *the district court was not required to apply the lodestar method to calculate class counsel's fees.*

(App. 8; emphasis added).

The scheme devised by class counsel and defendant works as follows: Plaintiffs' counsel file a class action lawsuit under a statute which provides for fee shifting – in the instant case the Truth-in-Lending Act (hereinafter TILA). Class counsel subsequently settle the case and the settlement agreement provides for the creation of a fund for class members but also provides that the attorneys' fee is *not* paid from the fund created for the class but through a separate payment by the defendants to the class's attorneys. Class counsel nonetheless ask the court to approve their fee request under common fund principles. Under the Ninth Circuit's *WPPSS* decision, *Dague* does not apply when fees are awarded from a common fund. The circuits however are divided on the issue of whether

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[1] The Ninth Circuit refused to address the *Dague* issue.

this Court's *Dague* prohibition against risk enhancement is confined to statutory fee-shifting principles or is applicable in common fund fee calculations as well.

For acceding to this *separate attorneys' fee payment/common fund* contrivance, defendant is rewarded in the event that the court reduces class counsel's fee request. In the instant case, as a result of the fairness hearing in which several objectors, including petitioners, argued that the $9 million fee was excessive, the court reduced the fee to $7.2 million. However, the $1.8 million fee reduction was returned to the defendants, in spite of the fact that under common fund principles the reduction should have gone to the class. As a result of this self-dealing by the negotiating parties, the class lost $1.8 million, class counsel got an excessive fee award by evading *Dague*, and the defendants received a windfall.

A decision by this Court at this time is particularly important. Public confidence in the legal profession is exceedingly low – at or near the bottom in most surveys, not least because too many lawyers are perceived as greedy and as acting in their own self-interest at the expense of their clients.[2] This state of affairs is confirmed by class action case law which notes that courts routinely

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[2] In a recent survey of public confidence . . . the category of "legal profession/lawyers" placed second lowest, with only 19% indicating that they were "extremely" or "very confident in" the profession. *Public Perceptions of Lawyers; Consumer Research Findings*, ABA Sec. of Litigation, April 2002, at 6. In that same survey, 57% indicated that "lawyers are more concerned with their own self-promotion than their client's best interests." *Id.* at 7. "[T]he greatest number of complaints arise around lawyers' fees. . . . Consumers say that lawyers charge too much. . . . " *Id.* at 14. A U.S. News & World Report poll found that "56 percent say lawyers use the system to . . . enrich themselves." Stephen Budiensky, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REPORT, Jan. 30, 1995, at 50-51.

approve fee requests which overcompensate class action lawyers.[3] Not surprisingly, class action filings have increased substantially in recent years.[4]

Class action attorneys, manipulating Rule 23 to enhance their fee awards, are eroding public respect for the legal system.[5] It is important that this Court ensure that its decisions in *Dague* and *Gisbrecht, supra,* and *Evans v. Jeff D.*, 475 U.S. 717 (1986) (hereinafter *Jeff D.*) (*see* pages 14-15, *infra*), are respected in letter and spirit. Federal courts should refuse to allow "the wool [to be] pulled over their eyes"[6] when awarding multimillion-dollar attorneys' fee awards under common fund principles when no common fund has been created. There is simply no justification for the notion that the decades-old distinction

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[3] For example, *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 287 (7th Cir. 2002) ("[I]nflated attorneys' fees are an endemic problem in class action litigation. . . . ").

[4] A survey done by the Federalist Society found that between 1988 and 1998, class action filings increased by 338% in federal courts and more than 1000% in state courts. *See* CLASS ACTION WATCH, *Analysis: Class Action Litigation, A Federalist Society Survey* (The Federalist Society for Law & Public Policy Studies, Wash., D.C.), Vol. 1, No. 1 (1999), at 3.

[5] Class Action System Survey, U.S. Chamber of Commerce, Institute for Legal Reform, www.litigationfairness.org. Poll conducted on May 11-12, 2002. In response to the question, who benefits most from the current class action lawsuit system, 45% answered the lawyers who represent the alleged victims, 28% the lawyers who represent the companies being sued, and only 5% answered the people who are part of the class action lawsuits. *Id.* at 4.

[6] "Yet, to some extent, the wool can be pulled over the court's eyes if the parties negotiate an agreement under which legal fees will be paid separately by the defendant." John C. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation,* Law & Contemp. Probl., 48 DUKE L. J. 3 (Summer 1985), at 71 n.102.

between common fund and fee-shifting methodologies "exalts form over substance."

STATEMENT OF THE CASE

This is an appeal from a district court judgment awarding reasonable attorneys' fees to class action lawyers under common fund principles when the fee was paid separately by the defendants pursuant to a fee-shifting statute. The settlement arose out of lawsuits filed in Texas by one group of class action lawyers and in California by another group of class action lawyers. The lawsuits were filed under TILA and alleged that the defendant banks, Citibank (South Dakota), N.A., Universal Bank, and Universal Financial Corporation, failed to credit customers' credit card payments on the date of receipt, when such payments were received after a 10:00 a.m. cutoff time. The lawsuits sought damages for the imposition of excess finance charges and late fees. After discovery, a settlement was reached in which the cutoff time was extended three hours from 10:00 a.m. to 1:00 p.m., and a cash fund of $18 million and other nonpecuniary benefits were established for the class. Class counsel negotiated a separate payment by the defendants of $9 million for attorneys' fees. The court approved the settlement and awarded class counsel a "reduced" fee of $7.2 million in fees *under common fund principles, in spite of the fact that the fees were paid separately by the defendant and were not part of the class's fund.* The $1.8 million fee reduction was not paid to the class but reverted to the defendants. The Ninth Circuit approved the procedure, relying on *Wing v. Asarco,* 114 F.3d 986 (9th Cir. 1997) (App. 8), for the proposition that:

> There is no bright line rule requiring the application of a particular method of calculating a fee award in a case where class counsel's fees are to be paid independently rather than out of the settlement fund.

STATEMENT OF FACTS

1. On October 1, 1999, three Texas class action law firms filed a class action against defendant Citibank in the federal court in Marshall, Texas, on behalf of plaintiff Willie Jimmerson. (App. 10).

2. On December 22, 1999, two California class action law firms filed a class action against defendant Citibank in the Superior Court of California on behalf of plaintiff Elliot Schwartz. (App. 11). Citibank removed this case to the federal District Court for the Central District of California. (App. 11).

3. The initial complaints alleged misconduct violating the federal Fair Credit Reporting Act, 15 U.S.C. § 1666(c), and the related 15 U.S.C. § 1640(a) arising under the Truth-in-Lending Act, 15 U.S.C. § 1601. (App. 12, 19 nn.2 & 3).

4. The named plaintiffs alleged that they "believed"[7] that the credit card payments would be credited to their account on the date that the payment was to be received by the bank.

5. The plaintiffs furthermore alleged that they were deceived by the payment procedure and that the late fees, finance charges, and other penalties assessed against them for payments received after the cutoff time were improper. The plaintiffs claimed that the alleged misconduct violated the federal Fair Credit Reporting Act, 15 U.S.C. § 1666(c), and the related 15 U.S.C. § 1640(a) arising under the Truth-in-Lending Act, 15 U.S.C. § 1601.

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[7] It was acknowledged that "in small print on the back" of their account statement, customers were advised that there was a 10:00 a.m. cutoff time and that payments after that time would be credited to their account as of the following business day.

6. The defendants agreed that the lawsuits could be settled as a class action and stipulated to conditional certification of a class consisting of "all consumers who have or at any time have had one or more VISA or MasterCard credit accounts marketed under the Citibank brand," as that term is defined under Regulation Z, 12 C.F.R. § 226.2(a)(11).

7. The terms of the settlement included provisions which provided that: (i) "the parties agree that reasonable attorneys' fees and costs from the class shall be *paid separately* by the defendants in an amount to be awarded by the court"; and (ii) defendants agree not to oppose an application for an award of attorneys' fees of up to $9 million . . . and no award greater than [that amount] shall be requested or made. . . . " (Appellee Citibank's Ninth Circuit Excerpts of Record at 18 (Settlement Agreement and Release, ¶ 22); emphasis added).

8. Plaintiff class member/objectors and appellants herein filed a timely objection to the settlement's $9 million attorneys' fee provision.

9. The district court conducted a fairness hearing with respect to the proposed settlement and award of attorneys' fees. At that hearing, numerous plaintiff class member/objectors, including petitioners herein, argued that the fee was excessive and that the court should perform a lodestar cross-check. (Appellant Simon, et al.'s Ninth Circuit Excerpts of Record at 49 (Dkt. 148, Hr'g Tr. 9/25/00, filed 12/12/00)).

10. The courts "crude lodestar cross-check" (App. 30) disclosed:

(a) Both dockets [the Texas litigation and the California litigation] reveal relatively little law and motion practice. (App. 29).

(b) Class counsel allege "hundreds of hours" spent investigating the facts and researching the issues of the case. (App. 30).

(c) Class counsel allege "over 700 hours" spent responding to class member inquiries concerning the settlement. (App. 30).

(d) The court (quite generously)[8] assumed a hypothetical 5,000 hours spent on the case, and awarded a fee which translated into an hourly rate of $1,440 per hour.[9]

11. Objectors raised the following additional arguments (Appellant Simon, et al.'s Ninth Circuit Excerpts of Record at 47 (Dkt. 123, Response to Class Counsel's Supplemental Memoranda on Attorneys' Fees, filed 10/25/00)).

(a) No common fund was created from which to pay class counsel a reasonable fee under common fund principles.

(b) The fee was paid separately from the class's recovery under statutory fee-shifting procedures and no risk multiplier was permissible under *Dague*.

12. On December 14, 2001, the district court entered an award of reasonable attorneys' fees to class counsel in the amount of $7.2 million. (App. 33). In the order, the court noted the following:

> *It exalts form over substance* to suggest that because the attorneys' fees are not directly deducted from the settlement fund, and are instead

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[8] *See* No. 10(a), (b), and (c) above.

[9] Five thousand hours and a $9 million fee award translates into an hourly rate of $1,800. (App. 30). (Five thousand hours and a $7.2 million fee award translates into $1,440 per hour).

> paid pursuant to an independent agreement with Defendants, that this is not a true common fund case.

(App. 16; emphasis added).

Appellants argued before the Ninth Circuit that the fee award was improper because the fee included a risk multiplier not permissible when attorneys' fees are paid separately by the defendant under a fee-shifting statute. The Ninth Circuit Court of Appeals, relying on *Wing v. Asarco, supra*,[10] affirmed the district court's award. The panel held that:

> We reject the arguments of the appellants ... Simon et al. challenging the method used by the district to calculate class counsel's fees. . . . *Even assuming that the settlement did not create a "common fund"* as a result of the agreement that class counsel's fees would be paid independently by Citibank and Universal, the district court was not required to apply the lodestar method to calculate class counsel's fees.

(App. 8; emphasis added).

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[10] However, this reliance on *Wing* sidestepped the issue of the relevance of *Dague* to the court's award:

> Although the district court did engage in a *Dague* debate with counsel, *we find it unnecessary to decide whether Dague extends to the case at hand*, since, as discussed below, the fee is justifiable on other grounds.

Wing v. Asarco, Inc., 114 F.3d at 989. (Emphasis added).

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S AWARD OF FEES UNDER COMMON FUND PRINCIPLES AS A PERCENTAGE OF THE CLASS'S RECOVERY IS DIRECTLY CONTRADICTORY TO THIS COURT'S RECENT DECISION IN *GISBRECHT v. BARNHART*, 535 U.S. 789 (2002), AND UNDERMINES THIS COURT'S DECISIONS IN *CITY OF BURLINGTON v. DAGUE*, 505 U.S. 557 (1992), AND *EVANS v. JEFF D.*, 475 U.S. 717 (1986).

A. The district court's award constituted a failure to follow this Court's prescribed legal principles for judicial awards of reasonable attorneys' fees.

The district court's award of reasonable attorneys' fees under TILA to class counsel under *common fund principles*, when the fee was paid *separately* by the defendants and when the residue resulting from a fee award lower than the one requested *reverted to the defendants*, not the plaintiff class, violates the prevailing legal standards for the judicial determination of reasonable attorneys' fees. The court's conclusion that the distinction between common fund principles and fee-shifting principles "exalts form over substance" is incorrect as a matter of law.

> The distinction between the fee in these two types of cases, statutory fee and common fund fee, *has practical relevance*. . . . [I]t affects how the fee is calculated, as the "lodestar" method applied to set a reasonable attorney's fee under a statutory fee provision . . . is not necessarily applied under the common fund doctrine.

Brytus v. Spang & Co., 203 F.3d 238, 242 (3rd Cir. 2000). (Citation omitted; emphasis added).

1. Common fund principles only apply when the attorneys' fee is paid *out of the class's recovery*.

> A lawyer . . . who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee *from the fund as a whole*.

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980).

The common fund doctrine is an equitable fee sharing mechanism recognized by this Court in *Trustees v. Greenough*, 105 U.S. 527, 532-33 (1881) to prevent unjust enrichment by those who would benefit from the efforts of a lawyer or litigant but who have no contractual obligation to pay the costs of the litigation from which they benefit.

> [The common fund doctrine exists to] avoid the unjust enrichment of those who . . . would be benefited by the fund without sharing in the expenses. . . .

Third Circuit Task Force Report, *Court-Awarded Attorneys' Fees*, 108 F.R.D. 237, 250 (1985).

2. When reasonable attorneys' fees are awarded in connection with a case brought under a fee-shifting statute and fees are paid separately by the defendants, fee-shifting principles are invoked.

(a) The lodestar approach applies.

> *The lodestar method today holds sway* in federal court adjudications of disputes over the amount of fees properly shifted to the loser in the litigation. . . .

Gisbrecht v. Barnhart, supra, 122 S.Ct. at 1818. (Emphasis added).

(b) Contingent risk lodestar multipliers are forbidden in the calculation of a reasonable attorneys' fee.

> Enhancement for contingency is *not* permitted under . . . fee shifting statutes. . . .

Dague, 505 U.S. at 567. (Emphasis added).

In this settlement, class counsel negotiated for a separate payment of $9 million in attorneys' fees from the settling defendants, not a payment of attorneys' fees from the class's recovery. (*See* Statement of Facts, No. 7, *supra*). The district court failed to apply the correct fee jurisprudence[11] when it used the percentage-of-the-recovery approach under common fund principles to award class counsel a fee which was paid separately by the defendants.

> [W]e again emphasize that the lodestar method was designed to govern imposition of fees on the losing party.

Gisbrecht v. Barnhart, *supra*, 122 S.Ct. at 1827.

Seeking fees under the common fund doctrine allows class action attorneys to avoid the restrictions of *Dague*, 505 U.S. 557, and allows them to argue in favor of the percentage approach because of the association between common fund recoveries and the percentage-of-the-recovery approach.

> [The fee under common fund principles] is calculated by awarding a reasonable percentage of the fund bestowed upon the class.

Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984).

3. An impermissible conflict of interest exists when class counsel structure settlement negotiations to obtain a payment of attorneys' fees separate from the class's recovery. In doing so, class counsel violated the rationale for this Court's decision in *Jeff D.*, *supra*.

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[11] The rationale applicable to the situation in which the fee is paid out of the recovery obtained by plaintiff is simply inapplicable where there is no such fund, and the award is paid directly by the defendant.

Tr. of Oral Argument, *City of Burlington v. Dague*, 1992 WL 687821 at *19-*20, *24-*26.

Jeff D. allowed simultaneous negotiation of attorneys' fees and the class's recovery in one lump sum settlement payment from the settling party. This Court noted that a lump payment enabled the settling party to determine its *total liability* and encouraged the settling party to put up a *full settlement* value without uncertainty about a subsequent large attorneys' fee payment.

> Many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorneys' fees in whatever amount the court might fix. . . .

Jeff D., 475 U.S. at 733.

The district court's utilization of common fund principles where the fee was paid separately by the defendants creates the very problem that this Court sought to avoid in *Jeff D.* The settling defendants can no longer place on the table the maximum amount of money available to settle the litigation because attorneys' fees do *not* come out of the total payment. Rather, the defendants, who have no interest in how the settlement funds are allocated between class counsel and the class:

> Defendants, having made their contribution to the settlement, are uninterested in the distribution so they *have no interest in opposing how the fee is allocated.*

Wells v. Dartmouth Bankcorp, Inc., 813 F. Supp. 126, 128 (D.N.H. 1993) (emphasis added), are put in the position of being concerned about the impending fee demand by class counsel and must hold back cash in anticipation thereof. Money not provided to the class is available for class counsel's fee.

(a) Class counsel's competition with their own clients for a share of what defendants will offer in settlement inhibits the class's ability to maximize its recovery. It is in class counsel's financial self-interest not to press for the

limit of what the defendants will pay in order that defendants have sufficient funds to satisfy class counsel's separate fee demand.

> [E]ven an attorney who would refuse . . . an outright bribe *might be tempted to make concessions* during the class negotiations, hoping to develop good will that will pay dividends when negotiating over [lawyers' fees].

In re Asbestos Litig., 90 F.3d 963, 1011 (5th Cir. 1996) (Dissenting opinion of Jerry E. Smith, J.). (Emphasis added).

The class was denied the benefit of a zealous advocate negotiating to maximize the class's recovery. To the contrary, class counsel, in derogation of their professional and fiduciary obligations, placed their pecuniary self-interest ahead of the class's.

> The separate negotiation of the fee . . . only enhances this sense that *counsel may have pursued a deal with the defendant* separate from, and perhaps competing for the defendant's resources with, the deal negotiated on behalf of the class.

In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 803 (3d Cir. 1995) (hereinafter *GM Pick-Up*). (Emphasis added).

At a time when class counsel were supposed to be vigorously negotiating on the class's behalf, they had to be concerned about ensuring that defendant retained sufficient cash to satisfy their ensuing request for fees.

> Defendants' attorneys knew that class counsel had an interest in assuring that there was *sufficient money available to pay their fee* after the class's recovery was negotiated, and they undoubtedly converted this knowledge into negotiating leverage.

In re Asbestos Litig., 90 F.3d at 1009. (Emphasis added).

(b) The class's right to its attorneys' fee award is bargained away by class counsel for their own benefit.

When plaintiffs sue under a statute which provides for fee shifting, defendants' payment of attorneys' fees is not the attorneys' recovery, it belongs to the client.

> Congress bestowed *on the prevailing party* a statutory eligibility for a discretionary award of attorneys' fees.

Jeff D., 475 U.S. at 730. (Emphasis added).

Class counsel negotiated a $9 million attorneys' fee payment from the defendants but the class was denied its legitimate right to the $1.8 million residual.

(c) Defendants receive a windfall at the expense of the class.

The defendants received an undeserved windfall of $1.8 million when the court reduced class counsel's $9 million fee request. In essence, class counsel and the defendants agreed that as long as $9 million went to class counsel, defendants had no objection to paying it. However, if the money did not go to class counsel, then it reverted to the defendants. Since the defendants had already agreed to pay $9 million and are indifferent to how the settlement money is allocated between class counsel and the class,

> [D]efendants are happy to pay generous attorneys' fees since all they care about is the bottom line – the sum of the settlement and the attorneys' fees – and *not* the allocation of money between the two categories of expense.

Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 282 (7th Cir. 2002) (emphasis added), there is no legitimate reason why, in the event of the court's reduction of the fee, the money should not go to the class.

(d) The separate payment of attorneys' fees and the application of common fund principles reduces the incentive of the court to scrutinize and the class to monitor the amount of class counsel's fee request.

(i) It disincentivizes class members because, even if the court reduces class counsel's fee (as it did in the instant case), no financial benefit is realized by the class.

(ii) It disincentivizes the trial court because, unlike a legitimate common fund, the court is no longer able to increase the class's recovery when it reduces the amount of fee. Settlements structured in this manner contradict the recommendation of the MANUAL FOR COMPLEX LITIGATION (Fed. Jud. Center 1977):

> The Manual [for Complex Litigation] condemns settlement agreements which provide that the fees and sometimes expenses of plaintiffs' counsel are to be paid separately by the defendant(s) over and above the settlement. . . . *Such arrangements should not be permitted.* All amounts to be paid by the defendant(s) are properly part of the settlement funds. . . . The effect of such an arrangement is to neutralize the court's power and responsibility to pass upon the reasonableness of the amounts to be paid to plaintiffs' counsel, since any reduction by the court in the amount counsel agree upon after the class settlement has been approved will simply go to reduce the aggregate amount defendant(s) will pay and will not increase the amount to be paid to the plaintiffs. As a result, there is little incentive for the judge to reduce the agreed upon fees.

In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1130-31 (1979). (Emphasis added).

It should be noted that class counsel further weakened the adversarial process as a result of the "clear sailing" provision whereby defendants agree not to oppose

a fee request of $9 million. (*See* Statement of Facts, *supra*, No. 7).

> A "clear sailing" clause has two adverse effects that cast substantial doubt on the legitimacy of its use. First, it deprives the trial court and a reviewing court of the certainty of having the propriety of the fee tested in the adversary process. [Second, the clause creates the likelihood that plaintiffs' counsel, in obtaining defendants' agreement not to challenge a fee request within a stated ceiling, will bargain away something of value to the plaintiffs' class.] It is unlikely that a defendant will gratuitously accede to the plaintiffs' request for a "clear sailing" clause without obtaining something in return.[12] That something will normally be *at the expense of the plaintiff class.*

Malchman v. Davis, 761 F.2d 893, 907-08 (1985). (Emphasis added).

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[12] Apparently taking judicial notice of the principle "you don't get something for nothing."

II. THE NINTH CIRCUIT'S ALLOWANCE OF CONTINGENT RISK ENHANCEMENT IN AWARDING REASONABLE ATTORNEYS' FEES UNDER COMMON FUND PRINCIPLES REFLECTS A DISAGREEMENT AMONG THE CIRCUITS REGARDING THE APPLICABILITY OF THIS COURT'S DECISION IN *CITY OF BURLINGTON v. DAGUE*, 505 U.S. 557 (1992).

A. This Court should resolve the dispute which has ensued as a result of its decision in *Dague*, prohibiting consideration of contingency risk to enhance the lodestar when calculating a court-awarded reasonable attorneys' fee under a fee-shifting statute.

The reason class action attorneys are encouraged to adopt the contrivance at issue in this appeal is because there presently exists a disagreement among the circuit courts of appeals and district courts regarding whether the *Dague* prohibition against enhancing the lodestar for contingency risk under fee-shifting statutes also applies when courts award reasonable attorneys' fees from common fund recoveries.

> *The Supreme Court has not yet decided* whether its decision in *Dague* precluding the use of a multiplier in consideration of risk taken when calculating fees under the lodestar method applies in common fund cases. . . .

Brytus v. Spang & Co., 203 F.3d at 243. (Citations omitted; emphasis added).

Compare WPPSS, 19 F.3d at 1299 ("*Dague's* rationale for barring risk multipliers in statutory fee cases does not operate to bar risk multipliers in common fund cases"), and *Florin v. NationsBank of Georgia* (hereinafter *Florin*), 34 F.3d 560, 564 (7th Cir. 1994) ("we conclude that the

holding in *Dague* should not extend to this case. . . . Common fund principles properly control a case which is initiated under a statute with a fee-shifting provision, but is settled with the creation of a common fund"),

with In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig. (hereinafter *GM Pick-Up)*, 55 F.3d 768, 822 (3d Cir. 1995) ("to the extent that the district court relied on the lodestar method, it erred by applying a multiplier . . . [t]he Supreme Court . . . has rejected the use of multipliers to enhance the lodestar's hourly rate amount") (applied to de facto common fund); and *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 619 (1st Cir. 1992) (J. Lay, concurring) ("I can discern no logical distinction between an equitable fund case and a fee-shifting case that would cause these [*Dague's*] reasons to be worthwhile in [fee-shifting but not in] an equitable fund case.").

Numerous federal district courts have weighed in on this dispute. *See, e.g., Nensel v. People's Heritage Financial Group*, 815 F. Supp. 26, 30 (D. Me. 1993) (*Dague's* proscription of the use of risk multipliers *applies* to common fund cases); *Weinberger v. Great Northern Nekoosa Corp.*, 801 F. Supp. 804, 825 n.59 (D. Me. 1992) (same); *In re Bolar Pharmaceutical Co. Sec. Litig.*, 800 F. Supp. 1091, 1095 (E.D.N.Y. 1992) ("ban on fee enhancement for contingency in statutory fee-shifting cases extends to equitable fund cases"). *But see Gottlieb v. Wiles*, 150 F.R.D. 174, 184 n.6 (D. Colo. 1993), for contrary analysis.

Petitioners believe that the Ninth Circuit interpretation of *Dague* is incorrect, as explained in the cases noted below.

Nensel v. People's Heritage Group, 815 F. Supp. at 28:

> Having once again carefully studied the reasons put forth in the *Dague* opinion as to why a multiplier-based enhancement is not warranted, the Court can see little, if any, basis to distinguish in

> the application of the holding in *Dague* between fee-shifting and common-fund cases.
>
> . . . .
>
> Enhancement for contingency in common-fund cases will *also* have the effect of compensating (on the basis of averages) counsel for services in cases where they have not prevailed and *will encourage the bringing of weak and unfounded class action suits*. (Emphasis added).

Trief v. Dunn & Bradstreet Corp., 840 F. Supp. 277, 284-85 (S.D.N.Y. 1993):

> The language of the [*Dague*] opinion, however, strongly suggests that the court's holding is applicable to common fund cases. . . . *Moreover, the City of Burlington court's reasoning is directly applicable to class action suits brought pursuant to Rule 23*. Each consideration enunciated by the *City of Burlington* court declining to permit enhancement of the lodestar is equally relevant to the question of whether the lodestar should be enhanced in this case. . . . [I]ts applicability is not limited to the context of federal fee-shifting statutes. (Citation omitted; emphasis added).

In re Prudential Ins. Co., 962 F. Supp. 572, 581 n.24 (D.N.J. 1997):

> The Supreme Court, however, held [in *Dague*] that risk enhancements were inappropriate in fee-shifting cases. While the Court did not address whether risk enhancements survive in common fund cases, *the Court's reasoning for excluding risk enhancements in fee-shifting cases applies equally to common fund cases*. (Emphasis added).

Weinberger v. Great Northern Nekoosa Corp., 801 F. Supp. at 825 n.59:

> Nonetheless, the *Dague* court's policy rationales in denying a contingency-based multiplier seems to be *equally applicable here*. (Emphasis added).

Dague proscribed contingent risk enhancement for the following reasons:

(1) Enhancement for contingency risk "would likely duplicate . . . factors already subsumed in the lodestar." *Dague*, 505 U.S. at 562.

(2) Enhancement for contingency risk "would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the 'reasonable fees' provisions." *Dague*, 505 U.S. at 563.

(3) Enhancement for contingency risk to attempt "to mimic the intricacies of the fee-paying market in every respect [is neither necessary nor even possible]." *Dague*, 505 U.S. at 566-67.

(4) Enhancement for contingency risk, under the conditions set forth in *Delaware Valley II*, 483 U.S. 711 [*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)], cannot "be intelligibly applied." *Dague*, 505 U.S. at 563.

(5) Enhancement for contingency risk requires that a defendant "would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail." *Dague*, 505 U.S. at 565.

(6) Enhancement for contingency risk "would make the setting of fees more complex and arbitrary, hence more unpredictable. . . . " *Dague*, 505 U.S. at 566.

All of the concerns which this Court expressed in *Dague* as reasons to prohibit contingency risk enhancement in fee-shifting cases, apply as well to fee calculations in common fund cases – *and several apply to common funds with even greater relevance*! Moreover, the courts which have held that *Dague* does *not* apply to common fund fee calculations focus only on the unfairness of

requiring a defendant to pay a higher fee based on the riskiness of the case.

> The concerns that drove the Court to reject contingency enhancements in the statutory fee context apply with much less force in common fund cases. Unlike statutory fee-shifting cases where the winner's attorneys' fees are paid by the losing party, *attorneys' fees in common fund cases are not paid by the losing defendant*, but by members of the plaintiff class.

WPPSS, 19 F.3d at 1300. (Emphasis added). *Accord, Florin,* 34 F.3d at 564 ("Unlike in fee-shifting cases, the fee award in a common fund case is ultimately charged against the plaintiffs' fund, rather than directly against the defendant.").[13]

Although in fee-shifting cases the defendant pays a reasonable fee and in common fund cases the plaintiff class pays a reasonable fee, there is no logical distinction between these types of public interest litigation which would make *Dague's* prohibition of risk enhancement inapplicable in common fund cases.

Furthermore, allowing two radically different fee outcomes based upon whether class counsel seek attorneys' fees from the defendant as opposed to the fund has numerous additional deleterious effects.

1. It frustrates the intent of Congress in establishing fee-shifting statutes.

In creating fee-shifting statutes, Congress intended to encourage lawyers to undertake specific types of litigation

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[13] It should be pointed out that neither *WPPSS* nor *Florin, supra*, even mention *Dague's* concern with incentivizing attorneys to file marginally meritorious lawsuits by awarding larger fees to riskier cases.

deemed to be in the public interest. However, current Ninth Circuit fee jurisprudence pays lawyers significantly higher fees[14] – for identical work – when "reasonable" attorneys' fees are paid out of a common fund recovery as opposed to when "reasonable" attorneys' fees are paid by a defendant under a fee-shifting provision. This incentivizes lawyers to do exactly the *opposite* of what Congress intended. It encourages attorneys to bring cases under statutes *without* fee-shifting provisions as well as to limit their selection of cases only to those which offer the potential of large common fund recoveries.

> This focus on damages would *contradict Congress's purpose* in providing for fee-shifting in these cases, which was "to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive and declaratory relief." Indeed, since fees paid out of a common fund are only available in multi-plaintiff actions, the widespread use of common-fund recoveries as a source of fees for lawyers . . . would not only skew the incentives of plaintiffs' lawyers toward damages rather than equitable remedies, but also toward class actions rather than suits by individuals.

Evans v. City of Evanston, 941 F.2d 473, 479 (7th Cir. 1991). (Citation omitted; emphasis added).

It simply makes no sense for courts to pay lawyers significantly *lower* "reasonable" attorneys' fees for pursuing cases which Congress sought to encourage and deemed to be of particular social benefit, and to pay *higher* "reasonable" attorneys' fees to lawyers who bring cases which

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[14] Multipliers of 4 are all too common in class action fee awards, *e.g.*, *Vizcaino v. Microsoft Corp.*, 209 F.3d 1043 (9th Cir. 2002); *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d (D.N.J. 2000); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465 (S.D.N.Y. 1998).

Congress did *not* feel of sufficient public benefit to warrant the guarantee of a reasonable attorneys' fee.

> Because these cases are not presumed to serve the public interest (as evidenced by the lack of a fee statute), there is no social policy reason that demands an adequate fee.

GM Pick-Up, 55 F.3d at 821.

Congress's purpose can only be achieved if a uniform fee methodology is established without reference to whether the litigation creates a common fund. Both Rule 23 and fee-shifting provisions were instituted by Congress to encourage public interest litigation. When a court is asked to determine a reasonable fee, there is no justification for having a radically different fee-enriching experience for lawyers in one type of public interest litigation and not the other when both serve the public good.[15]

> [W]e are of the view that where the court is called upon to set a fair and reasonable fee the same general method should be used regardless of the type of case involved.

Brewer v. Southern Union Co., 607 F. Supp. 1511, 1521 (D. Colo. 1984).

2. Failure to extend the *Dague* prohibition against risk multipliers to common fund recoveries creates a serious financial conflict of interest for plaintiffs' class counsel. It compromises the lawyers' fiduciary responsibility to maximize the class's recovery and incentivizes counsel to place their own financial interests ahead of the interests of the class.

Class counsel have a fiduciary responsibility to class members in class actions. ["Attorneys . . . seeking to represent the class assume fiduciary responsibilities to the

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[15] To paraphrase Gertrude Stein, a reasonable fee is a reasonable fee is a reasonable fee.

class. . . . " NEWBERG ON CLASS ACTIONS (3d ed.), Ch. 15, § 1503, *Relationship Between Class Representative or Counsel and Absent Class Members*]. This responsibility prevents even the appearance of impropriety.

> The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of *divided loyalties* of counsel.

Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir. 1995). (Emphasis added).

In light of *Dague*, the conflict of interest issue in litigation commenced under fee-shifting statutes and settled with the creation of a common fund is clear:

> In the usual common fund case, the question of whether the fund was created through a judgment or a settlement is irrelevant to the method by which the amount of compensation is determined. In a case such as this one, however, had plaintiffs prevailed at trial, it is entirely possible that defendants, rather than the common fund, would have been liable for attorney's fees under ERISA, 29 U.S.C.A. § 1132(g)(1). For the court to award plaintiffs' counsel a percentage of the settlement when he might only have been entitled to an hourly – and therefore possibly lower – fee had he obtained a favorable judgment, *would raise the specter of a significant conflict of interest between counsel and the absent class members in the negotiation of such a settlement.*

Bowen v. South Trust, 760 F. Supp. 889, 896 (M.D. Ala. 1991). (Footnote omitted; emphasis added).

Brytus v. Spang & Co., supra, recognized the problem of the disparity of different methods of calculating reasonable attorneys' fees for class counsel.

> Of course, there remains the possibility that in some cases counsel for a class of plaintiffs may receive a higher fee award upon settlement than

> they would have received had the case proceeded to judgment.

Brytus v. Spang & Co., 203 F.3d at 247.

This Court, in *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 621 (1997), acknowledged the client loyalty problem when class counsel were "confined to settlement negotiations [and] could not use the threat of litigation to press for a better settlement." In such circumstances, this Court held that class counsel were compromised in their ability to represent the class's interest. Similarly, as noted in *Brytus*, attorneys are also compromised as long as *Dague* does not extend to common fund recoveries because class counsel risk a lower court-awarded attorneys' fee by pressing the class's claim to trial, even in the event of an inadequate settlement offer.

On this point, Yale Law Professor (and Special Master) George L. Priest found *Dague's* prohibition against risk multipliers applicable to common fund recoveries. As noted in *McLendon v. Continental Group, Inc.*, 872 F. Supp. 142 (D.N.J. 1994):

> The Master concludes that the *Dague restriction must apply to any common fund case* that started as a fee-shifting case. He reasons that since *Dague* clearly prohibits any risk enhancement of lodestar amounts in statutory fee cases, then allowing such enhancement in such cases that settle for a lump sum would improperly encourage plaintiff attorneys to settle for lump sums in hopes of obtaining a risk enhancement that would not otherwise be available. Thus, the Master predicts that the Supreme Court would prohibit risk enhancement of the lodestar amount even if the award came from a common fund derived from a fee-shifting case. . . . In essence, the Master contends that if different rules apply to attorneys' fees once a fee-shifting case settles, then a conflict of interest inevitably would arise between plaintiffs and their attorneys as to the course of the litigation.

McLendon, 872 F. Supp. at 154. (Footnote and citation omitted; emphasis added). (Highlighting the controversy over these issues, Judge Sarokin overruled the Special Master's finding).

Class counsel should never be placed in the position of being able to engineer higher compensation for themselves by settling cases on terms which optimize their own recovery at the expense of maximizing the class's recovery. Allowing lawyers' self-interest to intrude upon their obligation to maximize their clients' recovery will only further weaken public confidence in the legal profession.

> The class action suit is designed to serve the public good, and the benefit to lawyers cannot be allowed to predominate.

Charles v. Goodyear Tire & Rubber Co., 976 F. Supp. 321, 325 n.3 (D.N.J. 1997).

3. The risk of encouraging unmeritorious litigation is far greater in the class action context than in traditional litigation. Class actions, by their very nature, have a significantly greater potential to result in settlements irrespective of the merits of the case than any other form of litigation.

> First, the class certification turns a $200,000 dispute . . . into a $200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement, *even if the customers' position is weak.*

Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 675 (7th Cir. 2001). (Emphasis added).

As noted by Judge Richard Posner in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995), class actions lend themselves to what has been described as "blackmail" settlements, i.e., settlements which rational business judgment requires that defendants settle, "even if they have no legal liability."

> Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability

> of an immense judgment in a class action "blackmail settlements."

Id. at 1298. One of the unfortunate consequences of the class action mechanism is that it requires defendants to settle lawsuits of questionable merit.

> But, where damages are a substantial issue, the combination of the expansion of liability, the uncertainty of the process, and the way our class action procedures are devised, almost always leads to *automatic settlement* or guaranteed settlement once a class action is certified.

George L. Priest, *Economics of Class Actions*, 9 KAN. J. L. & PUB. POL'Y 481, 482 (No. 3, Spring 2000). (Emphasis added).

CONCLUSION

Petitioners believe that the district court's assertion that the distinction between common fund principles and fee-shifting principles "exalts form over substance" is wrong as a matter of law. The *separate attorneys' fee payment/common fund* subterfuge unfairly and improperly benefits plaintiffs and defendants at the expense of the class.

Should this Court find that common fund principles apply in the context of a separate payment of attorneys' fees in fee-shifting litigation, then this Court should resolve the dispute among the circuits as to whether its *Dague* ruling applies when reasonable attorneys' fees are paid from a common fund. Hundreds of millions of dollars in class action recoveries are being diverted into the pockets of attorneys as long as this question remains unresolved.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated; NICOLE C. GIAMPAULO; WILLIE JO JIMMERSON, individually and on behalf of all others similarly situated; DANIEL RYAN, individually and on behalf of all others similarly situated; MARY ANN WILLIAMS, individually and on behalf of all others similarly situated;,

Plaintiffs-Appellees,

CHARLES C. YEOMANS,

Intervenor-Appellant,

and

JOHN G. DAVISSON; JAMES W. EAST; CARMEN SCHILTZ; MITCHELL A. GUZIK; DEBRA RAMCHANDANI; DAVID G.

No. 00-56958

D.C. No.
CV-00-00075-LGB

MEMORANDUM*

(Filed
Oct. 10, 2002)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

BEHENNA; FRANKLIN GRADY; MARGARET WINKLER; HANNAH FELDMAN; STEVEN SIMON; ALAN J. SPITZ; J. GARRETT KENDRICK,

Intervenors,

v.

CITIBANK (SOUTH DAKOTA), N.A.; UNIVERSAL BANK; UNIVERSAL FINANCIAL CORPORATION,

Defendants-Appellees.

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated; NICOLE C. GIAMPAULO; WILLIE JO JIMMERSON, individually and on behalf of all others similarly situated; DANIEL RYAN, individually and on behalf of all others similarly situated; MARY ANN WILLIAMS, individually and on behalf of all others similarly situated;,

Plaintiffs-Appellees,

DAVID G. BEHENNA,

Intervenor-Appellant,

and

No. 00-57037

D.C. No. CV-00-00075-LGB

JOHN G. DAVISSON; JAMES W. EAST; CARMEN SCHILTZ; MITCHELL A. GUZIK; DEBRA RAMCHANDANI; CHARLES C. YEOMANS; FRANKLIN GRADY; MARGARET WINKLER; HANNAH FELDMAN; STEVEN SIMON; ALAN J. SPITZ; J. GARRETT KENDRICK,

Intervenors,

v.

CITIBANK (SOUTH DAKOTA), N.A.; UNIVERSAL BANK; UNIVERSAL FINANCIAL CORPORATION,

Defendants-Appellees.

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated; NICOLE C. GIAMPAULO; WILLIE JO JIMMERSON, individually and on behalf of all others similarly situated; DANIEL RYAN, individually and on behalf of all others similarly situated; MARY ANN WILLIAMS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

and

No. 01-55177

D.C. No.
CV-00-00075-LGB

JOHN G. DAVISSON; JAMES W. EAST,

Intervenors,

v.

UNIVERSAL BANK; UNIVERSAL FINANCIAL CORPORATION;,

Defendants-Appellees,

STEVEN C. SIMON; ALAN J. SPITZ; DANIEL J. KELLEY,

Real Parties in Interest-Appellants.

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated; NICOLE C. GIAMPAULO; WILLIE JO JIMMERSON, individually and on behalf of all others similarly situated; DANIEL RYAN, individually and on behalf of all others similarly situated; MARY ANN WILLIAMS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

CITIBANK [SOUTH DAKOTA], N.A.; UNIVERSAL BANK;

No. 01-55179

D.C. No. CV-00-00075-LGB

UNIVERSAL FINANCIAL CORPORATION;,

Defendants-Appellees,

DAVID G. BEHENNA,

Real-party-in-interest-Appellant.

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted September 10, 2002
Pasadena, California

Before: THOMPSON and RAWLINSON, Circuit Judges and SCHWARZER, District Judge.**

The appellants in these cases, Charles C. Yeomans, David G. Behenna, and Steven C. Simon et al., raise several objections relating to the district court's conditional certification of a class for settlement purposes, approval of the settlement, and award of attorney fees. We have jurisdiction pursuant to 28 U.S.C. § 1291.

As an initial matter, the appellants Behenna and Yeomans, unnamed class members who failed to intervene before the district court, have standing to appeal the district court's judgment approving the settlement. *See Devlin v. Scardelletti,* ___ U.S. ___, 122 S. Ct. 2005, 2013

** The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

(2002). We reject, however, these appellants' contentions that conditional class certification was improper, that notice was insufficient, and that the district court failed to properly evaluate the fairness of the settlement.

Although the district court failed to make explicit findings regarding the appropriateness of class certification, we need not remand to allow the entry of self-evident findings. *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1023 (9th Cir. 1998). The class, as defined by the district court, was sufficiently cohesive to satisfy the requirements of Federal Rule of Civil Procedure 23(b)(3). *See Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623 (1997). Regardless of the potential differences in damages suffered by class members, all of their claims stem from Citibank and Universal's failure to credit payments to consumers' accounts as of the date on which they were received, unless the payments were received before 10:00 AM that day. Thus, the class members' claims are "sufficiently cohesive to warrant adjudication by representation." *Id.* (citation omitted). In addition, the named class representatives adequately and fairly represent the interests of the class as required by Federal Rule of Civil Procedure 23(a)(4). There is no inherent conflict of interest between the named plaintiffs, all of whom actually suffered late fees or finance charges as a result of defendants' polices [sic], and those class members who suffered no similar injury. *Hanlon,* 150 F.3d at 1020. The overarching goal of this litigation was to reimburse cardholders for finance charges and late fees actually incurred as a result of the defendants' early cut-off policy, and to change that policy. Each of the class plaintiffs, regardless of whether a monetary loss was suffered, had a similar interest in obtaining relief from the defendants' policy. *See In re Mego Fin. Corp.*

Sec. Litig., 213 F.3d 454, 462 (9th Cir. 2000). We conclude that class certification was appropriate.

The claims asserted on appeal challenging the timeliness and sufficiency of notice have been waived because they were not raised in the district court. *Arizona v. Components, Inc.*, 66 F.3d 213, 217 (9th Cir. 1995).

We also conclude that the settlement approved by the district court, including the provision for the independent payment of attorney fees, was "fundamentally fair, adequate, and reasonable." Fed. R. Civ. P. 23(e); *In re Mego*, 213 F.3d at 458. A cash settlement fund in the amount of $18 million was established to reimburse class members for finance charges and late fees incurred as a result of Citibank and Universal's early payment cut-off policy and to provide statutory damages. Citibank and Universal also agreed to substantial other relief, estimated by class counsel's expert to be worth at least another $18 million. Finally, Citibank and Universal agreed to independently pay class counsel's fees, in an amount to be determined by the district court, and agreed not to oppose an application seeking fees of up to $9 million.

Although the district court made no explicit findings, appellants have not shown approval of the settlement to have been an abuse of discretion. *Hanlon*, 150 F.3d at 1026-27. Nor have they shown anything inherently improper about the parties' negotiation of an agreement providing for the independent payment of class counsel's fees, and Citibank and Universal's agreement not to oppose a fee application which sought up to $9 million. *See Evans v. Jeff D.*, 475 U.S. 717, 738-40 (1986); *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1325-26 (9th Cir. 1999).

We reject the arguments of the appellants Behenna and Simon et al. challenging the method used by the district court to calculate class counsel's fees and the ultimate amount of fees awarded. Even assuming that the settlement did not create a "common fund" as a result of the agreement that class counsel's fees would be paid independently by Citibank and Universal, the district court was not required to apply the lodestar method to calculate class counsel's fees. *See Wing v. Asarco, Inc.*, 114 F.3d 986, 990 (9th Cir. 1997) (declining to establish bright line rule requiring the application of a particular method for calculating a fee award in a case such as this where class counsel's fees are to be paid independently, rather than out of the settlement fund). The district court articulated adequate reasons why the percentage of recovery method was preferable to the lodestar method of calculating class counsel's fees, and the court did not abuse its discretion in applying the former method rather than the latter.

The amount of the fees awarded to class counsel pursuant to the percent of recovery method was $7.2 million. That amount represented 20% of the $36 million total value of the settlement. Given the factors articulated by the district court, the court did not abuse its discretion in awarding fees of $7.2 million. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002).

Finally, as stated above, it was not improper for the settlement agreement to provide for the independent payment of attorney fees by Citibank and Universal. Under the settlement agreement, Citibank and Universal did not agree to pay $9 million in attorney fees. They agreed to pay fees in an amount to be determined by the

court, up to a maximum of $9 million. The court determined the amount of fees to be paid was $7.2 million. Citibank and Universal have no obligation to pay an additional $1.8 million to the class.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ELLIOT SCHWARTZ, NICOLE GIAMPAULO, WILLIE JIMMERSON, DANIEL RYAN, and MARY ANN WILLIAMS, individually and on behalf of all others similarly situated Plaintiffs, v. CITIBANK (SOUTH DAKOTA), N.S., UNIVERSAL BANK, N.A., and UNIVERSAL FINANCIAL CORP. Defendants.	CV 00-00075 LGB (JWJX) ORDER GRANTING CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND COSTS (Filed Dec. 13, 2000)

I. INTRODUCTION

Class Counsel bring a motion for an award of attorneys' fees and costs. Counsel request attorneys' fees in the amount of $9 million and costs in the amount of $250,000.

II. PROCEDURAL BACKGROUND

On October 1, 1999, Plaintiff Willie Jimmerson filed a class action against defendant Citibank in the Eastern District of Texas (the "Texas lawsuit"), which was subsequently amended to add Plaintiffs Daniel Ryan and Mary Williams as plaintiff. *See* Proposed Settlement Agreement

at 1 (the proposed settlement is set forth in full in the Declaration of Brian Strange in Support of Motion for Preliminary Approval of Settlement, Ex. A-1.) On December 22, 1999 Plaintiff Schwartz filed a class action against Citibank in the Superior Court of California (the "California lawsuit"). Citibank removed the aforementioned action to the District Court on January 4, 2000. Defendants Universal Bank and Universal Financial Corp. were added to the action on April 7, 2000. *See id.* on April 24, 2000, plaintiffs Jimmerson, Ryan and Williams were added to the California lawsuit. *See id.*

On April 27, 2000, the Court held a hearing on Plaintiffs' motion for preliminary approval of a settlement between Plaintiffs' class and the Defendants in this action. The Court granted preliminary approval on May 5, 2000. In conjunction with preliminary approval of the settlement, the Court also preliminarily certified a class for settlement purposes.

Plaintiffs filed a motion for final approval of settlement on August 25, 2000. On August 29, 2000, Plaintiffs' Counsel filed the instant motion for an award of attorneys' fees and costs. Neither of these motions are opposed by Defendants. At the final fairness hearing of September 25, 2000, the court permitted Class Counsel to submit additional briefing on the issue of attorneys' fees, and permitted objectors to file oppositions thereto.

III. FACTUAL BACKGROUND

The underlying action arose out of the policy of defendants Citibank, Universal Bank, and Universal Financial Corp. (collectively "Defendants") of failing to credit customers' credit card payments on the date of receipt, when

such payments were received after the "cutoff" time of 10:00 a.m. Plaintiffs brought this class action on behalf of similarly situated credit card holders, alleging that Defendants' policies resulted in imposition of excess finance charges and late fees on payments received on the specified "due date" but after the specified cutoff time. Plaintiffs alleged that the policy violates the Truth in Lending Act, and constitutes a breach of the credit card agreements Defendants entered into with class member credit card holders.

Pursuant to the proposed settlement agreement which was preliminarily approved by this Court, the parties agreed that Defendants would pay Class Counsel's attorneys' fees and expenses from a source independent of the settlement fund. *See* Proposed Settlement Agreement at ¶ 22. In other words, the fees and expenses would not be deducted from the amount set aside for settlement. Defendants further agreed not to oppose a motion by Class Counsel for attorneys' fees of up to $9 million and expenses of up to $250,000. *See id.* In conformance with the agreement, Class Counsel have applied to this Court for fees and expenses in the above amounts.

IV. LEGAL STANDARD

Rule 23 provides that "[a] class action shall not be dismissed or compromised without the approval of the court." Fed. R. Civ. Pro. 23(e). Judicial scrutiny of settlements under Rule 23 extends to motions for attorneys' fees. *See Strong v. Bellsouth Telecomm, Inc.*, 137 F. 3d 844, 849 (5th Cir. 1998); *Waters v. Int'l Precious Metals Corp.*, 190 F. 3d 1291, 1293 (11th Cir. 1999).

Agreements whereby the Defendant pays attorneys' fees from sources independent of the settlement fund are subject to judicial scrutiny, notwithstanding the fact that the fees are not directly deducted from the settlement fund. *See Weinberger v. Great Northern Nekoosa Corp.*, 925 F. 2d 518, 522 (1st Cir. 1991) ("when a fee application is submitted ancillary to, or as part of, the termination of a class action, the district court should ordinarily determine the reasonableness of the fees, notwithstanding that the source of payment does not directly impair the class recovery."); *Strong v. Bellsouth Telecomm, Inc.*, 137 F. 3d at 849 (recognizing "economic reality that a settling defendant is concerned only with its total liability.") Scrutiny is required because of the potential for conflicts of interest between Class Counsel and the members of the class. *See In re General Motors Corp. Pick-up Truck Fuel Tank Products Liab. Litig.*, 55 F. 3d 768, 804 (3rd Cir. 1995); *Weinberger*, 925 F. 2d at 524 (recognizing risk that "the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees.")

Furthermore, the fact that a Defendant has agreed not to oppose an application for attorneys' fees up to a specified amount, often known as a "clear sailing agreement," does not absolve the Court of the duty to scrutinize the fee request. *See Duhaime v. John Hancock Mutual Life Insurance Co.*, 989 F. Supp. 375, 376 (D. Mass. 1997) ("a 'clear sailing' fee agreement like the one negotiated here must receive close judicial scrutiny.")

Several methods are available for calculating attorneys' fees. The two most common are the percentage-of-recovery method ("POR" method) and the lodestar method. Under the former method, attorneys' fees are determined

as a specific percentage of the settlement fund. Under the latter method, the Court calculates the "lodestar" by multiplying the reasonable hours expended by a reasonable hourly rate, and then enhances the lodestar by a "multiplier" when appropriate. *See Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 298 (N.D. Cal. 1995). The central inquiry under both methods is whether the fees requested are reasonable. *See id.* at 296. The burden rests with counsel to establish a factual basis to support the requested attorneys' fees award. *See Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)

V. ANALYSIS

Class Counsel request Court approval of attorneys' fees of $9 million and expenses of $250,000.

A. ATTORNEYS' FEES

Counsel argue for application of the percentage-of-recovery approach, and arrive at the $9 million figure by applying a percentage "benchmark" of 25% to a total settlement which Counsel value at $36 million. Counsel's motion presents the Court with three issues: (1) whether the POR method is appropriate in this instance; (2) whether $36 million is the appropriate total settlement value to be used in the fees calculation; and (3) whether 25% is the appropriate "benchmark".

1. SELECTION OF APPROPRIATE FEE CALCULATION METHOD

The percentage-of-recovery method and lodestar method are typically used in distinct types of cases. As explained in *In re Prudential Company of America Sales Practices Litig.*, 148 F. 3d 283, 333 (3rd Cir. 1998):

> The percentage-of-recovery method is generally favored in cases involving a common fund[1], and is designed to allow courts to award fees from the fund "in a manner that rewards counsel for success and penalizes it for failure." [Citation]. The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation.

See also Blum v. Stenson, 465 U.S. 886, 900 n. 16 (1984) ("Lodestar is the most appropriate means of calculating attorney's fees in statutory fee cases because it allows "counsel [to] spend as much time and [to] be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the . . . rights of a single individual.") However, Courts retain discretion as to which method to

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[1] "Common fund" cases involve class actions that generate a settlement fund. Attorneys' fees are deducted directly from the fund as compensation by the class to class counsel for their efforts in creating the fund. In contrast to statutory fee-shifting provisions, the common fund doctrine is a product of case law, and derives from the district courts' equitable power to prevent unjust enrichment of the class members at the expense of class counsel. *See Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980).

apply in assessing the reasonableness of an attorneys' fees award in a class action. *See In re Washington Pub. Power Supply System Sec. Litig.*, 19 F. 3d 1291, 1294 n. 2 (9th Cir. 1994); *Six Mexican Workers v. Arizona Citrus Growers*, 904 F. 2d 1301, 1311 (9th Cir. 1990).

(a) Common Fund Doctrine vs. Statutory Fee-Shifting

The first issue presented to the Court is whether the instant action can be characterized as a common fund case. Class Counsel argue for such a characterization, thereby justifying the use of POR in calculating attorneys' fees. Various objectors argue that, because Defendants will pay attorneys' fees from a source independent of the class settlement fund, the arrangement is properly characterized as a fee-shifting case and the lodestar method should be used. *See e.g.* Response of Objector David Behenna to Plaintiffs' Supplemental Briefing at 2-3; Response of Objectors Kelly, Simon and Spitz at 3. In essence, objectors contend that because the attorneys' fees will not be directly deducted from the settlement fund, this is not a true common fund case.

The purpose of the common fund doctrine is to reward attorneys for generating a benefit to the class, by deducting attorneys' fees from the settlement fund. *See Graulty*, 886 F.2d at 271. It exalts form over substance to suggest that because the attorneys' fees are not directly deducted from the settlement fund, and are instead paid pursuant to an independent agreement with Defendants, that this is not a true common fund case. The reason for this was well-stated in *Johnston v. Comerica Mortgage Corp.*, 83 F. 3d 241, 246 (8th Cir. 1996):

> The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery. [Citation.] Accordingly, the direct payment of attorney fees by defendants should not be a barrier to the use of the percentage of the benefit analysis in the cases.

See also In re General Motors, 55 F.3d at 821 ("The rationale behind the percentage of recovery method also applies in situations where, although the parties claim that the fee and settlement are independent, they actually come from the same source."); *In re Prudential*, 148 F. 3d at 333-334. As such, the Court concludes that the parties' agreement to pay attorneys' fees from a source other than the settlement fund does not preclude this case from being characterized as a common fund case.

(b) Effect of the TILA Claim

The Complaint in this action alleged Truth in Lending Act violations, state law deceptive trade practices, breach of contract, and fraudulent or negligent misrepresentation. *See* Plaintiff's Second Amended Complaint. The state law claims are clear candidates for use of the POR approach because a common settlement fund was recovered on those claims, and no statutory fee-shifting provision is applicable. The TILA cause of action, on the other hand, presents the Court with a more difficult issue because the statute expressly provides for shifting of attorneys' fees when a plaintiff succeeds on the claim. *See* 15 U.S.C. 1640(a)(3). As stated earlier, the lodestar method is more frequently used in statutory fee-shifting cases. The Court must therefore decide whether it can nevertheless use the POR

method on the portion of the settlement fund attributable to the TILA claim.

Class Counsel argue that the Court may use POR because the TILA's fee-shifting provision is not triggered at all. *See* California Counsel's Supplemental Application for Attorneys' Fees at 6-7 ("Supplemental Application at 6-7"). Because this case resulted in the creation of a class settlement fund, rather than an individual judgment on the merits, Class Counsel argue that common fund principles apply instead of statutory fee-shifting principles. *See id.* The precise issue presented by Counsel's argument is whether the creation of a common fund in settling a TILA class action "converts" the action from a statutory fee-shifting case to common law common fund case. If the action is removed from the confines of TILA's fee-shifting provision, then the Court may properly apply the POR method to that portion of the settlement fund attributable to the TILA claim.

The Court's examination of case law reveals no cases either authorizing or prohibiting use of common fund principles when a settlement fund is created in TILA cases. However, cases involving other fee-shifting statutes hold that "fee-shifting statutes should not circumscribe the operation of the common fund doctrine unless that operation conflicts with an intended purpose of the statute." *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 886 F. Supp. 445, 456 (1995) (holding ERISA's fee-shifting provision inapplicable to case resolved by creation of a common settlement fund); *Florin v. Nationsbank of Georgia*, 34 F. 3d 560, 564 (7th Cir. 1994) (same); *Skelton v. General Motors Corp.*, 860 F.2d 250 (7th Cir. 1988). In *Skelton*, the Seventh Circuit concluded that the Magnuson-Moss Act's fee-shifting provision did not apply

to cases settled by establishment of a common fund. In arriving at its conclusion, the court found that neither the language of the statute nor its legislative history purported to apply the fee-shifting provision to cases creating a common fund. *See id.* at 255. Absent such a mandate in the statute, the court felt free to adopt common fund principles in its attorneys' fees determination. *See id.* at 255 ("when a settlement fund is created in exchange for release of the defendant's liability both for damages and for statutory attorneys' fees, equitable fund principles must govern the court's award of the attorneys' fees."). *See also In re Fine Paper Antitrust Litig.*, 751 F. 2d 562, 583-584 (3rd Cir. 1984) (Clayton Act settlement releasing defendant from liability for damages and statutory attorneys' fees is governed by common fund principles).

Here, the language of section 1640 does not by its terms apply to cases settled by the creation of a common fund.[2] Nor does the statute's legislative history provide any evidence of Congress' intent to apply TILA's fee-shifting provision to common settlement fund cases. As such, there is no statutory mandate requiring application of the fee-shifting provision, and its associated lodestar method, to the instant case. Furthermore, case law imposes no limitation on the Court's ability to apply common fund principles to the TILA settlement.[3] For these reasons,

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[2] Section 1640(a)(3) of the Truth in Lending Act provides that any creditor who fails to comply with any requirement imposed under, *inter alia* part D [which contains section 1666c] is liable "in the case of any successful action" for "the costs of the action, together with a reasonable attorneys' fee as determined by the Court."

[3] Where a suit does not involve a class action settlement fund, the Ninth Circuit applies TILA's fee-shifting provision, and therefore

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the Court concludes that TILA's statutory fee-shifting provision does not foreclose application of common fund principles, including use of the POR method, to the TILA portion of the settlement.[4]

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mandates use of the lodestar method. *See Semar v. Platte Valley Federal Savings & Loan Assocn.*, 791 F. 2d 699, 706 (9th Cir. 1986); *Hayer v. National Bank of Alaska*, 663 P. 2d 547 (Alaska, 1983). The preference for the lodestar over the POR method in such cases is premised on the fact that individual damages in a TILA case are capped at $1,000. *See* 15 U.S.C. § 1640(a)(2)(A)(ii). Were the POR method permitted in non-class action suits involving few plaintiffs, it would usually result in under-compensation of the attorney for his or her efforts. Under such circumstances, use of the POR method would undermine the fee-shifting provision's goal of encouraging "private attorney general" enforcement of TILA. *See Hayer*, 663 P. 2d at 549 fn. 7 (POR method "would be inconsistent with the policy of encouraging private enforcement of the Act."). Where, as here, a class action settlement results in the creation of a substantial common fund, a fee determination under the POR method would not under-compensate plaintiffs' attorneys in the same way. As such, the concerns expressed in the above cases about stimulating private enforcement of TILA are addressed even under the POR method when the attorneys stand to recover a percentage of a common settlement fund. The Ninth Circuit cases do not therefore directly address the situation presented here.

[4] The Court further notes that a contrary conclusion would pose significant practical problems. If the Court were to apply the lodestar approach to the TILA portion of the settlement, and POR to the remaining non-TILA portion, any attempt to allocate hours spent by Class Counsel on the TILA claim would be arbitrary at best. *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F. 2d 268, 272 (9th Cir. 1989) (using POR instead of lodestar because "it would be impractical, if not impossible, for the district court to determine the number of hours expended by [counsel]" in creating 70% of the settlement fund.) The Court finds no evidence that Congress contemplated such an arbitrary division of labor in common fund cases involving multiple causes of action.

(c) Lodestar vs. Percentage of Recovery

The import of the Court's foregoing discussion is that the entirety of the settlement (TILA and non-TILA claims) is a common fund and, as such, can be analyzed under common fund principles, thereby permitting use of the POR method. The next issue presented is, even though the use of the POR method is permissible in the instant case, is it necessarily desirable? Such an inquiry is properly before the Court because selection of an appropriate method is committed to the discretion of the district court. *See Graulty*, 886 F. 2d at 271; *Florida v. Dunne*, 915 F. 2d 542, 544 (9th Cir. 1990); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F. 3d 602, 607 (9th Cir. 1997) ("The district court has discretion to use the lodestar method or the percentage of the fund method in common fund cases.")

The Court concludes that the POR method is more desirable for several reasons. First, the POR method more closely aligns the interest of the class with those of class counsel, and does not create a disincentive for the early settlement of cases. *See Duhaime v. John Hancock Mutual Life Insurance Co.*, 908 F. Supp. 375, 377 (D. Mass. 1997). Second, given that five law firms are involved in this action, use of the lodestar method would be needlessly time-consuming and inefficient. *See In re Oracle Secs. Litigation*, 131 F.R.D. 688, 689 (C.D. Cal. 1990) (criticizing lodestar approach in class action litigation); *In re Activision Secs. Litigation*, 723 F. Supp. 1373 (C.D. Cal. 1989); *In re Prudential*, 148 F. 3d at 333-334; "Court Awarded Attorney Fees", *Report of the Third Circuit Task Force* 108 F.R.D. 237, 246-249 (1985). Third, the POR approach reduces the necessity of retrospectively second-guessing strategic decisions made by class counsel in the course of

litigating the action. *See Kirchoff v. Flynn*, 786 F. 2d 320, 325 (7th Cir. 1986). Finally, the concern that the POR method will provide inadequate compensation to counsel is not applicable in a class action, where the settlement value can potentially reach substantial sums.

The Court is cognizant of some of the disadvantages of the POR method. This method can create the incentive for class counsel to enter settlements too willingly, in order to guarantee fees for themselves. Furthermore, POR fee awards run the risk of being excessive when not aligned to the work actually performed by counsel. *See* Objector Behenna's September 26 Reply at 13-14. The Court finds, however, that these shortcomings are outweighed by the substantial savings in time, and the greater uniformity in fee awards, engendered by the POR method. Furthermore, objector Behenna's concern about creating a fee award disproportionate to Class Counsel's efforts are addressed in the Court's selection of the appropriate percentage benchmark, discussed below. Behenna's objection, while useful in determining the appropriate amount of fees under the POR method, is not a basis for rejecting the POR method itself.

Having selected the percentage-of-recovery method, the Court must now make two determinations: (1) whether $36 million is the appropriate total settlement value to be used in the fees calculation; and (2) whether 25% is the appropriate "benchmark".

II [sic]. VALUATION OF THE SETTLEMENT

Courts must make a "reasonable estimate" of the total value of a class settlement. *See In re Prudential*, 148 F. 3d

at 333-334. The settlement in the instant case is comprised of a cash fund of $18 million and of certain procedural commitments by Defendants to change their crediting practices. Among other things, Defendants promise that for a period of two years they will implement a one-day grace period for imposition of finance charges and late fees, and will change their payment cutoff time from 10 a.m. to 1 p.m. *See* Settlement Agreement at ¶ 4. Class Counsel assert that the non-cash value of the settlement, in the form of Defendants' procedural commitments, is conservatively estimated at $18 million. As such, Class Counsel argue that the total settlement value upon which the Court should base the attorneys' fees award is at least $36 million. *See* Class Counsel's Original Motion at 6; Strange Decl. at ¶ 9.

Class Counsel are clearly entitled to a percentage of the $18 million cash settlement secured for the class.[5] The

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[5] Various objectors argue that the Court must deduct $2.5 million of the cash value in calculating the percentage, because Defendants could potentially recoup this amount. *See* Settlement Agreement (providing that if any portion of the $2.5 million set aside for Finance Charge Refunds remains unclaimed, Defendants may apply such excess portions to recoupment of costs incurred in sending out class action notices); Hannah Feldman's August 31 Objections at 6; Dehenna's August 31 Objections at 22; Klein's Supplemental Objections at 2. Objectors' argument has been considered, and rejected, by other courts addressing the issue. *See Waters v. Int'l. Precious Metals Corp.*, 190 F. 3d 1291, 1297 (11th Cir. 1999) ("class counsel are entitled to a reasonable fee based on the funds potentially available to be claimed, regardless of the amount actually claimed.") (quoting Newberg on Class Actions § 14.03 at 14 (3rd ed. 1992)). *See also Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) ("attorneys for a successful class may recover a fee based on the entire common fund created for the class, even if some class members make no claims

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more contested issue in this case is whether Class Counsel are entitled to a percentage of the non-cash value.

(a) Using POR When Settlement Contains Injunctive Relief

Various objectors argue that the POR method is inappropriate when the settlement consists of "intangible" injunctive relief. *See e.g.* Objector Behenna's September 26 Reply at 13-14. Objector Behenna cites *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) for the proposition that "in the Ninth Circuit, injunctive relief benefits do not qualify for common fund treatment because injunctive relief is considered to be of speculative value." Behenna's October 13 Objections at 4.

Objector misreads *Hanlon*. That case simply noted in dicta that courts *prefer* the lodestar method when valuations are difficult, but went on to acknowledge that the attorneys' fees in that case "represents roughly 4.5% of this [non-cash] 'common fund.'" *Hanlon*, 150 F.3d at 1029. Furthermore, objectors point to no cases, and the Court has found none, prohibiting use of the POR method when the settlement involves both cash and non-cash components. *See e.g. In re General Motors,* 55 F. 3d at 820-822 (holding that POR method was more appropriate in a class action settlement, even though settlement involved "hard to value" non-cash relief in the form of redeemable coupons to purchase new pick up trucks). Finally, the Court

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against the fund so that money remains in it that otherwise would be returned to the defendants.")

finds that the policy behind rewarding counsel for providing the class with injunctive relief is sound. Non-pecuniary settlements, in the form of commitments to change the practices challenged in a class action, are often instrumental in vindicating class members' rights, and can be the primary source of value to class members. *See Stewart v. County of Sonoma,* 634 F.Supp. 773, 777 (N.D. Cal. 1986) ("The monetary value of the recovery is not the sole measure of success where plaintiff has received structural or other injunctive relief vindicating civil rights.") Class counsel who secure such non-pecuniary value for class members should be rewarded in order to encourage counsel to pursue such remedies when they are appropriate.

(b) Valuation of the Injunctive Relief

Class counsel provide valuations of the injunctive relief using declarations of Defendants' employees and the testimony of their economic expert, Dr. Laura Robinson. As stated earlier, the injunctive relief in this settlement consists of three principal components: (1) a two-year obligation to implement a one-day grace period before imposing late fees; (2) a two-year obligation to change their payment cutoff time from 10 a.m. to 1 p.m.; and (3) a two-year obligation to make various disclosures to cardholders concerning Defendants' payment crediting practices. *See* Settlement Agreement at ¶ 4.

Class Counsel's evidence provides the following estimates: a one-day grace period causes Defendants to forgo late fees in the amount of approximately $80 million

for payments received after 1 p.m.[6] *See* Robinson Decl. ¶ 10. Furthermore, the change in cutoff time from 10 a.m. to 1 p.m. results in 23% more customer payments being deemed timely. *See* Robinson Decl., Ex. 2. This causes Defendants to forgo an additional $46 million in late fees for payments received between 10 a.m. and 1 p.m.[7] *See* Robinson Decl. ¶ 8. The change in cutoff time also causes Citibank and Universal to forgo approximately $8.3 million and $2.3 million in finance charges respectively over the two-year period[8] *See* Robinson Decl., Ex. 3. Based on the foregoing evidence, Dr. Robinson values the

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[6] This figure is calculated using the following information: (1) Defendants generate approximately $100 million in late fees per year (declaration of Defendants' employee Roger Kent ¶ 2); (2) based on mail receipt data from Defendants' New Jersey processing facility, Defendants receive approximately 40% of payments after 1 p.m. (Robinson Decl. ¶ 10 and Ex. 2). As such, over the two-year period, Defendants will forgo $80 million [100 million * 40% * 2] in late fees for payments received after 1 p.m.

[7] Multiplying the estimated $100 million in annual late fees presently received (Kent Decl. ¶ 2) by the 23% increase in timely payments under the new cutoff time (Robinson Decl., Ex. 2) results in $23 million of forgone late fees per year. Over the two-year procedural commitment, Defendants will therefore forgo approximately $46 million in late fees because of the change in cutoff time.

[8] These figures were calculated using actual finance charge data compiled by Citibank and Universal employees for the year of 1999. (O'Hare Decl. at 3; Bush Decl. at 3). Dr. Robinson multiplied the total annual finance charges received in 1999 by the percentage of payments received between 10 a.m. and 1 p.m. to arrive at an estimate of the total finance charges each Defendant will forego because of the change in cutoff time. *See* Robinson Decl., Ex. 3.

settlement's injunctive relief at approximately $137 million. *See* Robinson Decl. at ¶ 12.[9]

In their motions, Class Counsel do not premise their fee award on Dr. Robinson's $137 million estimate. Rather, Counsel rely on Dr. Robinson's methodology and conclusions but substantially discount her estimates to arrive at a "conservative" value of $18 million for the injunctive relief. *See* Motion at 6; Kramer Decl. in Support of Motion ¶ 4. Counsel value the elimination of an extra day of finance charges (as a result of the new cutoff time) at approximately $10 million. *See* Named Plaintiffs' Response to Objections at ¶ 11. This figure is close to the approximate $11 million value, discussed above, assigned by Dr. Robinson in her calculation. Based on the employee declarations and expert calculations provided by Class Counsel, the Court concludes that $10 million is a "reasonable estimate" of the value provided to the class in terms of reduced finance charges. *See In re Prudential Insurance Co. of America Sales Practices Litig.*, 148 F. 3d at 333-334 (court must make a reasonable estimate of settlement value); *In re General Motors,* 55 F.3d at 822.

Counsel value the elimination of an extra day of late fees (as a result of the one-day grace period and the new cutoff time) at $8 million. *See* Named Plaintiffs' Response to Objections at ¶ 12. This figure is substantially less than the $126 million value ($80 million from the grace period and $46 million from the change in cutoff time) estimated

[9] Because of the speculative nature of the benefit, neither Class Counsel or Dr. Robinson assigned any monetary value to Defendants' disclosure obligations.

by Dr. Robinson based on Defendants' records and employee declarations. Counsel explain that, while they could have valued the benefit at the full $126 million, they discounted it to $8 million "because the precise economic value of this benefit is not easily stated." Named Plaintiffs' Response to Objections at ¶ 12. *See also* Robinson Decl. ¶ 3 (concluding that Counsel's $18 million valuation of the injunctive relief is conservative). Having examined the financial data offered by Class Counsel, the Court concludes that $8 million is a "reasonable estimate" of the value provided to the class in terms of reduced late fees. Counsel correctly discounts the financial estimates provided by Defendants' employees and Dr. Robinson to account for the uncertainty inherent in valuing injunctive relief of this nature. For this reason, the Court concludes that Class Counsel have provided adequate evidentiary support for an $18 million valuation of the injunctive relief in this case.

Some objectors contend that the one-day grace period provides merely an illusory benefit to the class, because Defendants already had an informal grace period in place before the initiation of this action. *See* Klein's Supplemental Objection at 4; Behenna's September 26 Objections at 14, fn. 10. Objectors' argument ignores the crucial fact that the settlement agreement now *obligates* Defendants to maintain this grace period for two years, an obligation which did not exist prior to the settlement. As such, it is proper for the Court to consider this provision of the settlement when determining the total settlement value.

3. SELECTION OF APPROPRIATE BENCHMARK

The Ninth Circuit has established a "benchmark" of 25% for attorneys' fees awards in common fund cases. *See Six Mexican Workers v. Arizona Citrus Growers,* 904 F. 3d 1301, 1311 (9th Cir. 1990). The benchmark should be adjusted "when the specific circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors." *Id.*

Objector Behenna argues that Class Counsel have expended insufficient time and effort on the case to justify a $9 million fee award. *See* Behenna's September 25, 2000 Reply at 10. Having examined the dockets of the California and Texas litigation and Class Counsel's declarations, the Court concludes that an adjustment of the benchmark is in order.

The case dockets reveal that the Texas litigation commenced only 14 months ago, on October 1, 1999, while the California litigation commenced in Los Angeles Superior Court less than one year ago, on December 22, 1999. *See* Plaintiffs' Response to Objections, Ex. C (Texas Docket). Furthermore, both dockets reveal relatively little law and motions practice.[10] Declarations filed in support of

[10] The Texas litigation has seen Defendants' motion to dismiss; Defendants' motion to change venue; Plaintiffs' motion to compel responses to interrogatories; Defendants' motion to abate discovery; Defendants' motion for judgment on the pleadings; and Defendants' motion for entry of a confidentiality order. *See* Plaintiffs' Response to Objections, Ex. C. The California litigation has seen no substantive motions prior to the motion for preliminary approval of the settlement, filed on April 26, 2000.

the attorneys' fee motion attest that Class Counsel have spent "hundreds of hours" investigating the facts and researching the novel legal issues involved in the case. *See* Monts Decl. in Support of Motion at ¶ 3. Counsel further allege that they have spent "over 700 hours" responding to class member inquiries concerning the settlement. *See* Kramer Decl. in Support of Motion at ¶ 15. Even if the Court were to hypothetically assume that Counsel collectively spent 5,000 hours litigating and settling the case, a $9 million fee award translates into an hourly rate of $1,800. Even this crude cross-check using the lodestar method reveals that Counsel's requested fee award is disproportionate to the amount of time expended on the case.[11]

Class Counsel argue that under the POR method "the amount of time may not be considered at all." Class Counsel's reply to Certain Objectors' Responses at 12 (quoting *Shaw v. Toshiba America Information Sys. Inc.*, 91 F. Supp. 2d 942 (E.D. Tex. 2000)). The Court is aware that one of the purposes of the POR method is to reward counsel for the benefits created, not for the hours spent. However, the Ninth Circuit's admonition to district courts to consider "specific circumstances" making the POR

[11] The Court declines to follow various objectors' suggestion that the Court employ a detailed lodestar analysis to cross-check the POR fee award. *See* Hannah Feldman's October 10 Response at 3; Response of Objectors' Kelley, Simon and Spitz at 7-8. Any increased accuracy in the final fee award achieved by an extensive lodestar cross-check is far outweighed by the loss in efficiency and consistency that are the hallmarks of the POR method. Furthermore, the Court's rudimentary lodestar cross-check, above, provides a sufficient check on excessive fee awards that resort to a more detailed lodestar calculation is unnecessary.

recovery too small or too large, including "the hours devoted to the case," directly contradicts Class Counsel's contention. *See Six Mexican Workers,* 904 F. 3d at 1311.

Selecting an appropriate benchmark is an inherently imprecise exercise which district courts have continued to struggle with in determining appropriate fee awards. However, in light of the Court's conclusion that Class Counsel has devoted relatively few hours to the case, the Court concludes that downward adjustment of the benchmark to 20% is reasonable. A 20% benchmark achieves the appropriate balance between compensating Class Counsel within the "normal range of 20% to 30%" of the common fund, and adjusting for the amount of effort expended by Class Counsel in this action. *See Mashburn v. Nat'l, Healthcare, Inc.,* 684 F.Supp. 679, 696 (M.D. Al. 1988) (cited with approval in *Graulty,* 886 F.2d at 272); *In re Union Carbide Corp. Consumer Prods. Business Sec. Litig.,* 724 F. Supp. 160, 167 (S.D.N.Y. 1989). The Court awards Class Counsel attorneys' fees using a benchmark of 20% on a total settlement value of $36 million[12] – $18 million cash plus $18 million in injunctive relief. Class

[12] Class Counsel, in the alternative, urge the Court to value the cash portion of the settlement at $27 million. This figure is comprised of the $18 million cash fund and the $9 million attorneys' fees Defendants obligated themselves to pay to Counsel. *See* California Counsels Supplemental Application at 21. The Court does not consider the $9 million fee agreement to be part of the common fund because this money is not recoverable by class members under the terms of the fee agreement. If the Court awards a fee of less than $9 million, the excess does not become part of the common fund distributed to the class. As such, the common fund doctrine's purpose of rewarding counsel for benefits secured for the class is not furthered by including the $9 million in the total settlement value.

Counsel are therefore entitled to attorneys' fees of $7.2 million.

B. EXPENSES

Class Counsel also request $250,000 as reimbursement for expenses. *See* Motion at 6. To be entitled to an expense reimbursement, class counsel must provide the Court with adequate documentation of the expenses incurred during litigation and settlement. *See Van Vranken,* 901 F. Supp. at 298 (reimbursement granted where "request was supported by a detailed accounting and by declarations from independent counsel . . . "); *In re "Agent Orange" Products Liab. Litig.,* 611 F. Supp. 1296, 1314 (E.D.N.Y. 1985). Class Counsel must further establish that such costs are "reasonable and necessary" to the prosecution of the class action. *See Waters v. Int'l. Precious Metals Corp.,* 190 F. 3d 1291, 1298 (11th Cir. 1999) ("there is a requirement . . . on the part of class counsel to establish that the costs are reasonable and necessary . . . to the prosecution of the case.")

Here, Class Counsel provide documentation of expenses that total $157,541.47. *See* Strange Decl. in Support of Supplemental Application for Attorneys' Fees at ¶ 6 (Strange & Hoey firm has incurred $61,972.64 in costs, including travel expenses, research, filing fees, messengers shipping, and telephone charges); Kramer Decl. ¶ 9 (Law Offices of Larry Kramer – $15,808.06 in costs); Angelovich Decl. ¶ 3 (Nix, Patterson & Roach firm – $33,724.49 in costs); Norman Decl. ¶ 3 (Crowley & Douglas firm – $25,606.04 in costs); and Monts Decl. at 4:3-6 (Monts & Ware firm – $20,430.24 in costs).

However, Counsel have failed to provide any documentation supporting the balance of the $250,000 in expenses sought via the instant motion. Instead, Counsel rely on conclusory assertions contained in their declarations to the effect that Counsel anticipate these remaining expenses to be incurred if the final settlement is appealed. *See e.g.* Norman Decl. at ¶ 4 (Counsel's statement that "based on my experience in similar class action litigation, a minimum of $10,000.00 in additional reasonable and necessary expenses will be incurred by Counsel for the class in the reference cases if the Proposed Settlement is given final approval but later appealed."); Angelovich Decl. at ¶ 4 (same). Class Counsel's vague assertions do not provide the Court with a basis to determine whether these future expenses are reasonable and necessary. As such, the Court concludes that Counsel are entitled to only $157,541.47 as reimbursement for the expenses incurred thus far.

VI. CONCLUSION

The Court **AWARDS** Class Counsel $7,200,000 in attorneys' fees and $157,541.47 as reimbursement for expenses.

IT IS SO ORDERED.

Dated: December 12, 2000

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al., Plaintiffs-Appellees, CHARLES C. YEOMANS, Intervenor-Appellant, and JOHN G. DAVISSON, et al., Intervenors, v. CITIBANK (SOUTH DAKOTA), N.A., et al., Defendants-Appellees.	Nos. 00-56958 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles (Filed Nov. 18, 2002)

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al., Plaintiffs-Appellees, DAVID G. BEHENNA, Intervenor-Appellant, and JOHN G. DAVISSON, et al., Intervenors, v.	No. 00-57037 D.C. No. CV-00-00075-LGB Central District of California, Los Angeles

CITIBANK (SOUTH DAKOTA), N.A., et al.,

Defendants-Appellees.

ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al.,

Plaintiffs-Appellees,

and

JOHN G. DAVISSON, et al.,

Intervenors,

v.

UNIVERSAL BANK, et al.,

Defendants-Appellees,

STEVEN C. SIMON, et al.,

Real Parties in Interest-Appellants.

No. 01-55177

D.C. No. CV-00-00075-LGB Central District of California, Los Angeles

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ELLIOTT SCHWARTZ, an individual on behalf of himself and all others similarly situated, et al.,

Plaintiffs-Appellees,

v.

CITIBANK (SOUTH DAKOTA), N.A., et al.,

Defendants-Appellees,

No. 01-55179

D.C. No. CV-00-00075-LGB Central District of California, Los Angeles

ORDER

DAVID G. BEHENNA,

Real-party-in-
interest-Appellant.

Before: THOMPSON and RAWLINSON, Circuit Judges and SCHWARZER, District Judge.*

The panel, as constituted above, has unanimously voted to deny appellant Yeomans' petition for rehearing. Judge Rawlinson has also voted to deny his petition for rehearing by the court en banc, and Judges Thompson and Schwarzer have recommended that that petition be denied.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.